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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

YOLANDA AGUILAR, et al.,
Appellants,

v.

BETTY-LOUISE FELTON, et al.,
Appellees.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION,
Appellant,

v.

BETTY-LOUISE FELTON, et al.,
Appellees.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,
Appellant,

v.

BETTY-LOUISE FELTON, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN JEWISH CONGRESS, THE NATIONAL EDUCATION ASSOCIATION, AND THE NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*, *AMICI CURIAE*, IN SUPPORT OF APPELLEES.

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49pp

TABLE OF CONTENTS

Pages

QUESTION PRESENTED.....1

INTEREST OF AMICI CURIAE.....2

INTRODUCTORY STATEMENT.....4

ARGUMENT:

THE ESTABLISHMENT CLAUSE FORBIDS THE USE OF PUBLIC SCHOOL TEACHERS TO TEACH SECULAR SKILLS IN RELIGIOUS SCHOOLS.....7

A. The Provision of Public School Teachers to Parochial Schools to Teach Secular Skills Constitutes Forbidden Aid to the Religious Institution and Cannot Be Fairly Characterized as Mere Aid to the Child.....7

B. The Use of Public School Teachers to Provide Instruction in Secular Skills on the Premises of a Religious School Constitutes a Per Se Entanglement of Church and State In Violation of the Establishment Clause.....22

1. The Danger of Religious Influence on Secular Programs.....24

2. The Danger of Secular Influence on Religous Programs.....33

CONCLUSION.....41

TABLE OF AUTHORITIES

Cases	Pages
Board of Education v. Allen, 392 U.S. 236 (1968)	7, 9, 16
Committee for Public Education v. Nyquist, 413 U.S. 756 (1973)	passim
Committee for Public Education v. Regan, 444 U.S. 646 (1980)	8, 9, 10, 28
Everson v. Board of Education, 330 U.S. 1 (1974)	passim
Hunt v. McNair, 413 U.S. 734 (1973)	7, 10, 11
Larkin v. Grendel's Den, 459 U.S. 116 (1982)	24
Lemon v. Kurtzman, 403 U.S. 602 (1971)	passim
Levitt v. Committee for Public Education, 413 U.S. 472 (1973)	7, 12, 26
Meek v. Pittenger, 421 U.S. 349 (1975)	passim
Mueller v. Allen, 77 L.Ed.2d 721 (1983)	5, 8, 10
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)	35, 36

Pierce v. Society of Sisters,
268 U.S. 510 (1925).....8

Public Funds for Public
Schools v. Byrne,
590 F.2d 514 (3rd Cir.),
aff'd mem.,
442 U.S. 907 (1979).....8, 10

Public Funds for Public
Schools v. Marburger,
358 F. Supp. 29
(D.N.Y. 1973),
aff'd mem.,
417 U.S. 961 (1974).....8, 38

Rescue Army v. Municipal Court,
331 U.S. 549 (1947).....30

Roemer v. Board of Public
Works,
426 U.S. 736 (1976).....8, 10

School District of Grand
Rapids v. Ball,
cert. pending,
No. 83-990.....34

Sloan v. Lemon,
413 U.S. 825 (1973).....8

Tilton v. Richardson,
403 U.S. 672 (1971).....7, 40

United Americans for
Public Schools v.
Franchise Tax Board,
419 U.S. 890, aff'g
No. C-73-0090 (N.D.Cal.).....8

Walz v. Tax Commission,
397 U.S. 664 (1970).....5, 10

Wheeler v. Barrera,
417 U.S. 402 (1974).....8, 29, 30,

Wolman v. Essex,
342 F. Supp. 399
(S.D. Ohio), aff'd,
409 U.S. 808 (1972).....8

Wolman v. Walter,
433 U.S. 229 (1975).....passim

Statutory and Constitutional Provisions

Title I of the Elementary and
Secondary Schools Act of 1965,
Pub. L. No. 89-10, 79 Stat. 27,
20 U.S.C. § 2701 et seq.....4, 18

Title VI, Civil Rights Act of 1964,
42 U.S.C. § 2000d.....40

United States Constitution,
Amendment I.....passim

Other Authorities

Chicago Tribune,
October 28, 1984,
Sec. 2, p. 1.....40

QUESTION PRESENTED

Whether the government may undertake part of the educational function of religious schools by compensating and stationing public school teachers in religious schools to teach basic reading and mathematics skills without thereby violating the Establishment Clause.

INTEREST OF AMICI CURIAE

Amici are organizations dedicated both to preserving the guarantees of religious liberty set forth in the First Amendment and to strengthening and maintaining public education as a bulwark of our nation's democratic well-being. Amici, each of whom is listed in the margin, have been involved either directly or as amici curiae in many of the leading Free Exercise Clause and Establishment Clause cases in this Court and throughout the country.[1]

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[1] The American Civil Liberties Union; the American Jewish Congress; the National Education Association; the National Coalition for Public Education and Religious Liberty, on behalf of the following constituent organizations: the American Association of School Administrators, the American Ethical Union, Americans for Religious Liberty, the American Humanist Association, the Baptist Joint Committee on Public Affairs, the Board of Church and Society of the United Methodist Church, the Central Conference of American Rabbis, the Minnesota Civil Liberties Union, the Missouri Baptist Christian Life Commission, Monroe Citizens for PEARL, Nassau-Suffolk PEARL, the Michigan Council About Parochial Education, the National Association of Catholic Laity, the National Council of Jewish Women, the National Service Conference of the American Ethical Union, Preserve Our Public Schools, [cont'd. on next pg]

With the consent of the parties, indicated by letters lodged with the clerk, we file this brief amici curiae to bring our experience to bear on a case in which the Court must once again decide the permissibility of government aid to religious schools. In our view, the resolution of this case may well determine whether the separation of church and state that the Court has heretofore steadfastly protected will be seriously undermined.

Public Funds for Public Schools of New Jersey, the Ohio Association for Public Education and Religious Liberty, the Union of American Hebrew Congregations, the Unitarian Universalist Association; the Citizen's Union (New York), the New York Society for Ethical Culture, the United Community Centers (New York), the United Parents Association of New York City, and the Women's City Club of New York.

INTRODUCTORY STATEMENT

The New York City Board of Education assigns hundreds of public school teachers to some 231 parochial schools to teach basic reading and mathematical skills to children with below-average educational skills in localities with a high concentration of children from lower-income families. The classes, financed by Federal funds authorized by Title I of the Elementary and Secondary Education Act of 1965,[2] are integrated into the parochial school curriculum; are taught on parochial school premises by public school teachers who confer with their parochial school colleagues on the progress of each child; and are, quite properly, viewed as a valuable educational component of the total parochial school experience. Indeed, the success of the Title I program significantly

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[2] Pub. L. No. 89-10, 79 Stat. 27, as amended, 20 U.S.C. § 2701 et seq. (1982).

aids the ultimate success of the parochial school's educational mission.

This case is not about whether the delivery of such "remedial" educational services to economically and educationally deprived children attending parochial schools provides educational benefits to such children. Of course it does. Nor is it about whether society may encourage the delivery of such services by granting income tax deductions to donors who elect to support such a program, see Walz v. Tax Commission, 397 U.S. 664 (1970), or by granting certain broadly based tax benefits to parents who must bear a portion of its cost. Compare Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), with Mueller v. Allen, 77 L.Ed.2d 72 (1983). Nor is this case even about whether such services may be provided by the government to all poor children, including children enrolled in religious

schools, in a public setting. Compare Meek v. Pittenger, 421 U.S. 349 (1975) with Wolman v. Walter, 433 U.S. 229 (1977).

The only issue raised by this case is whether the government may aid a religious school in performing its core educational function by stationing public school teachers in religious schools to teach reading and mathematics skills. Amici believe that when the government sends public school teachers into religious schools to teach secular skills, the program cannot be characterized as a permissible form of "aid to the child," as opposed to forbidden "aid to the religious institution," without dissolving the intellectual underpinning of the distinction. Moreover, the physical mixing of church and state which New York City's program entails endangers both the independence of the benefitted religious institution and the secular nature of the

Title I educational program.

ARGUMENT

THE ESTABLISHMENT CLAUSE FORBIDS THE USE OF PUBLIC SCHOOL TEACHERS TO TEACH SECULAR SKILLS IN RELIGIOUS SCHOOLS

A. The Provision of Public School Teachers to Parochial Schools to Teach Secular Skills Constitutes Forbidden Aid to the Religious Institution and Cannot Be Fairly Characterized as Mere Aid to the Child.

This is at least the twentieth time in recent years that the Court has confronted the problem of defining the restraints imposed by the Establishment Clause on attempts to channel public resources to support religious education.[3] In an

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[3] Everson v. Board of Education, 330 U.S. 1 (1947); Board of Education v. Allen, 392 U.S. 236 (1968); Lemon v. Kurtzman, 403 U.S. 602 (1971); Tilton v. Richardson, 403 U.S. 672 (1971); Hunt v. McNair, 413 U.S. 734 (1973); Levitt v. Committee for Public Education, 413 U.S. 472 (1973); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973); Wheeler v. Barrera, 417 U.S. 402 (1974); Meek v. Pittenger, 421 U.S. 349 (1975); Roemer v. Board of Public Works, 426 U.S. 736 (1976); Wolman v. Walter, 433 U.S. 229 (1977); New
[cont'd. on next pg]

understandable attempt to respect the core values of the Establishment Clause while accommodating the constitutionally protected right to choose a religious education[4], the Court has attempted to distinguish between permissible government aid to the parents or children involved and forbidden aid to the religious institution itself. See, e.g., Committee for Public Education v. Nyquist,

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York v. Cathedral Academy, 434 U.S. 125 (1977); Committee for Public Education v. Regan, 444 U.S. 646 (1980); Mueller v. Allen, 77 L.Ed.2d 721 (1983); School District of Grand Rapids v. Ball, cert. granted, 52 U.S.L.W. 3631 (U.S. Feb. 22, 1984) (No. 83-990). See also Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio), aff'd mem.. 409 U.S. 808 (1972); Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972), aff'd mem. sub nom. Grit v. Wolman, 413 U.S. 901 (1973); Public Funds for Public Schools v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974); United Americans for Public Schools v. Franchise Tax Board, 419 U.S. 890 (1975), aff'g No. C-73-0090 (N.D. Cal.); Public Funds for Public Schools v. Byrne, 590 F.2d 514 (3rd Cir.), aff'd mem., 442 U.S. 907 (1979).

[4] The constitutional basis of a right to opt for a religious education flows from both the Free Exercise and Due Process Clauses. See Pierce v. Society of Sisters, 268 U.S. 510 (1925).

413 U.S. at 780-87. Such a distinction is in some respects artificial, since any aid to parents and children inevitably aids the institution they have chosen to attend by freeing resources for use in other aspects of the religious school's program. Id. at 783. Nonetheless, distinguishing as it does between social benefits such as bus rides and diagnostic testing, on the one hand, and the core educational function of religious school, on the other, the line corresponds to the Court's correct sense of a vital Establishment Clause distinction between permitted and forbidden government assistance to religious education.

This distinction has permitted tangible aid to religious education in the form of bus transportation,[5] text book loans to students,[6] tax benefits for contributions and

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[5] Everson v. Board of Education, 330 U.S. 1 (1947).

[6] Board of Education v. Allen, 392 U.S. 236 (1968).
[cont'd. on next pg]

broadly based educational payments to religious schools,[7] assistance to parochial schools in administering and grading state-required standardized tests and in administering and evaluating diagnostic tests,[8] provision of therapeutic services,[9] and provision of auxiliary educational services to all children in a public setting.[10]

But see Public Funds for Public Schools v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974).

[7] Walz v. Tax Commission, 397 U.S. 664 (1970); Mueller v. Allen, 77 L.Ed.2d 721 (1983).

[8] Wolman v. Walter, 433 U.S. 229 (1977); Committee for Public Education v. Regan, 444 U.S. 646 (1980).

[9] Wolman v. Walter, supra.

[10] Id. The Court has also approved federal construction grants to sectarian colleges, Tilton v. Richardson, 403 U.S. 672 (1971), state backing for bonds issued by sectarian colleges, Hunt v. McNair, 413 U.S. 734 (1973), and grants to sectarian colleges for maintenance of physical plant, Roemer v. Board of Public Works, 426 U.S. 736 (1976), on the ground that religiously affiliated colleges are not generally pervasively religious. See Hunt v. McNair, 413 U.S. at 743-44.

Conversely, whenever the State has attempted to assist religious schools in performing the basic teaching function which is the raison d'etre of a religious school, this Court has recognized that the Establishment Clause required the invalidation of the program. See generally Nyquist, 413 U.S. at 783-86. If public school teachers may enter the parochial schools to teach secular skills as part of the parochial school curriculum under the rubric of permissible "aid to children," no discernible, much less principled, Establishment Clause check will exist on massive aid to parochial schools. Accordingly, this Court has repeatedly invalidated attempts to subsidize the core teaching function of parochial schools.

At the very outset of the Court's school aid jurisprudence, all nine justices quite plainly agreed that aid to the educational function of such schools would be

unconstitutional. Everson v. Board of Education, 330 U.S. 1 (1947). Later, when Pennsylvania and Rhode Island sought to subsidize parochial school teachers for time spent teaching secular subjects, this Court invalidated the program. Lemon v. Kurtzman, 403 U.S. 602 (1973). When New York sought to pay parochial school teachers for preparing tests for use in teaching secular courses, this Court invalidated the program. Levitt v. Committee for Public Education, 413 U.S. 472 (1973). When Pennsylvania sought to pay for instructional materials and aids to be used in connection with secular subjects in the parochial school curriculum, this Court declared the program unconstitutional. Meek v. Pittenger, 421 U.S. 349 (1975). See also Wolman v. Walter, supra. Indeed, in Meek v. Pittenger, supra, this Court explicitly upheld a program that provided auxiliary educational services to all students on non-

religious school premises, but struck down a program designed to deliver auxiliary educational services to parochial students in parochial schools as an integral part of the parochial school curriculum.

While the line between permissible "aid to children" and forbidden aid to a religious school has, at times, been a wavering one, this Court has consistently recognized that the on-premises teaching function is at the heart of any educational enterprise. Accordingly, this Court has refused to permit public subsidization of the on-premises teaching function of a religious school, recognizing that, quite apart from the substantial risk of unconstitutional entanglement, see infra at 22-41, such subsidization constitutes unmistakable government aid to a religious institution in violation of the Establishment Clause. As the Court held in Meek, "it would simply

ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by ... church-related ... schools." 421 US. at 365. See also Wolman v. Walter, 433 U.S. at 249-51; Meek v. Pittenger, 421 U.S. at 363-66; Committee for Public Education v. Nyquist, 413 U.S. at 781-83; Everson v. Board of Education, 330 U.S. at 21-24 (Jackson, J., dissenting).

Appellants argue that, so long as aid is couched in a form that minimizes the danger of entanglement, the Establishment Clause poses no obstacle to the use of public school teachers to teach "remedial" secular skills on the premises of a parochial school as an integral part of the curriculum. However, even apart from the question of entanglement, public subsidization of the on-premises teaching function of a parochial school has repeatedly been held unconstitutional, and

judgment for the appellants would accordingly require overruling Meek, Wolman, and Nyquist.

If the use of public school teachers for on-premises teaching in a religious school is valid in a Title I "remedial" context, it must also be valid in an enrichment context; in a program for gifted children; or as part of a government takeover of broad segments of the secular curriculum, ranging from physical education to mathematics. Indeed, if the benevolent fiction of viewing aid to non-educational aspects of religious schools as aid to children is extended to the use of public school teachers for the on-premises teaching of secular skills in religious schools, then there would exist no logical or principled stopping point prior to the creation of joint educational enterprises, with public school teachers undertaking to teach broad areas of the secular curriculum and religious educators accepting

responsibility for religious instruction. Certainly neither the United States nor the other appellants suggest one.[11]

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[11] The Court should not content itself to permit this benign, apparently circumscribed program to pass constitutional muster, and ignore the Establishment Clause problems that would be presented by a program sending public school teachers into religious schools to teach further portions or all of the secular curriculum. In a landmark case for modern Establishment Clause doctrine, the Chief Justice wrote for the Court that the development of a coherent body of Establishment Clause principles requires the court to be sure that a small step in a certain direction will not lead to an undesirable destination:

> [I]n constitutional adjudication some steps, which when taken were thought to approach 'the verge,' have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop. Development by momentum is not invariably bad; indeed, it is the way the common law has grown, but it is a force to be recognized and reckoned with. The dangers are increased by the difficulty of perceiving in advance exactly where the 'verge' of the precipice lies.

Lemon v. Kurtzman, 403 U.S. at 624. See also Wolman v. Walter, 433 U.S. at 251 n. 18 (recognizing tension between Board of Education v. Allen and "continued adherence to the principles announced in our ... cases" and declining, therefore, to extend Allen). In short, the Court should not lightly dismiss the prospect of finding itself on a "slippery slope."

It strains credulity and "ignores reality" to suggest that direct public aid to the secular curriculum represents aid only to the child, but not to the institution itself. State provision of teachers of reading and mathematics subsidizes the core educational function that is the sine qua non of the operation of any school, public or parochial. Paying for a mathematics teacher is a far cry from paying for bus transportation. Contrary to the appellants' urgings, the Court's previous cases rest on this understanding that the religious schools as a whole have a religious purpose and function which is inevitably aided by government assistance to the core educational endeavor, not on the narrow and crabbed view that the only danger was that a particular teacher would deliberately cross the line. See, e.g., Meek v. Pittenger, 421 U.S. at

369-72.

Petitioners attempt to draw, but notably not to justify on any principled basis, a line that would permit aid in the present context but would not necessarily sanction aid to wider segments of the secular curriculum in religious schools. Petitioners seek to assure the Court that permitting public school teachers to teach secular skills on the premises of a religious school pursuant to the Title I program does not implicate the remainder of the secular curriculum because Title I skills are "remedial" and must by law supplement, and not supplant, the existing curriculum. 20 U.S.C. §§ 2734(f), 2736(c). However, such an attempt to differentiate "remedial" or "auxiliary" teaching from the "regular" educational function of any school is both educationally indefensible and wholly impractical, as well as without any logic in

constitutional principle.

As an educational matter, no clear line exists between remedial teaching and the regular curriculum, especially at the level of teaching basic skills. When a first-grade teacher teaches a child to read, it is impossible to divide the process between regular and remedial teaching. If the government may fund the so-called remedial phase of the process, what principle will preclude it from funding any subsequent phase? Both blend indistinguishably into an educational whole.

Moreover, from a practical standpoint, the concept of remedial teaching, even if it could be isolated and identified, is logically indistinguishable from a host of teaching functions, such as enrichment programs designed to deepen the traditional curriculum; programs to teach intellectually gifted children; programs designed to enhance

artistic and mechanical skills; and programs designed to increase vocational choice. Thus, attempts to carve the teaching function into slivers, some of which can be viewed as part of the regular curriculum and some of which would be viewed as supplemental or auxiliary, is nothing more than a blueprint for the gradual public takeover of an undefinable percentage, and perhaps all, of the teaching responsiblity of a religious school.

Whatever the undeniable social utility of increasing the quality of education in our nation's religious schools, it cannot be achieved by diverting teachers from the public schools to teach secular skills in religious schools under the fiction that the teachers are merely aiding children and not subsidizing a religious institution. While the concept of aid to children, as opposed to aid to religious institutions, may have

principled meaning as applied to benefits like bus transportation and health care, it begins to lose principled meaning the closer one gets to the core teaching function. Indeed, even the provision of textbooks and off-premises instructional services places a good deal of tension on the distinction. Wolman v. Walter, 433 U.S. at 251 n. 18. Were the concept of "aid to children" to be even further extended to accommodate the use of public school teachers to provide instruction in basic secular skills on the premises of the religious school itself, the distinction would cease to have meaning, and virtually any form of aid to the secular curriculum of a parochial school would be valid, so long as it followed the appropriate semantic formula of "aid to the child."

Of course, to argue that public school teachers may not be despatched to parochial schools to teach secular skills to

disadvantaged children is not to suggest that such teaching should not occur. However, the combination of indirect subsidization through the use of charitable constributions and broad-based tax benefits and the existence of mechanisms to permit the delivery of such services to all children in a public setting renders it unnecessary to erode the Establishment Clause to achieve a socially desirable end. We can have both respect for the Establishment Clause and effective instruction of disadvantaged children in parochial schools.[12]

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[12] Although appellants urge that they tried measures short of placing public school teachers in religious schools, the record makes clear that such efforts were half-hearted at best. Title I was passed in 1965; the present program was in effect by 1966.

B. The Use of Public School Teachers to Provide Instruction in Secular Skills on the Premises of a Religious School Constitutes a Per se Entanglement of Church and State In Violation of the Establishment Clause.

In part A, supra, amici have argued that paying public school teachers to teach secular skills on the premises of a parochial school must be viewed as government aid to a religious institution. This Court has also recognized that even if such a program could be described as "aid to the child" and not forbidden aid to a religious institution, it nevertheless falls afoul of the Establishment Clause because it results in the entanglement of church and state.

The entanglement prong of this Court's three-part test in Establishment Clause cases is designed to advance two significant policies. First, it safeguards the independence of religious institutions by

assuring that secular officials do not acquire the power to influence or interfere with the decisions of religious bodies; and, second, it assures that religious bodies do not exercise influence in the administration of government programs. The stationing of public school teachers on parochial school premises to teach secular subjects to parochial school students compromises both values.

1. The Danger of Religious Influence on Secular Programs.

The bulk of this Court's entanglement analysis has centered on assuring that the administration of secular programs involving religious institutions remains free from religious influence. See, e.g., Larkin v. Grendel's Den, 459 U.S. 116, 125-27 (1982); Wolman v. Walter, 433 U.S. at 254; Meek v. Pittenger, 421 U.S. at 367-72; Lemon v. Kurtzman, 403 U.S. at 618-19. Whenever a

program has exhibited the potential for religious influence in the administration of a secular program, this Court has invalidated it.

In Lemon v. Kurtzman, supra, this Court invalidated a 15 percent state subsidy of parochial teachers' salaries, designed to reflect time spent teaching clearly secular subjects, on the ground that the religious nature of the institutions involved created a danger that religious impulses would influence the teaching of the secular program.[13] 403 U.S. at 615-20. In Committee for Public Education v. Nyquist, this Court invalidated state grants to parochial schools for the maintenance of physical plant because the religious nature of the institution

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[13] While the Court's analysis in Lemon centered on entanglement, the case is equally explicable as an example of this Court's refusal to permit public aid to the on-premises teaching function of a parochial school.

created a danger that the grants would be used, not solely for the upkeep of secular facilities, but for the maintenance of religious facilities as well. 413 U.S. at 774-780.[14] In Levitt v. Committee for Public Education, payments to parochial schools for teacher-prepared texts were invalidated because of the danger that religious concerns would influence decisions about the content of the tests. 413 U.S. at 480-81.[15] In Meek v. Pittenger, and Wolman v. Walter, payments to parochial schools for instructional materials and teaching aids were invalidated for the same reasons. Indeed, the Court in Meek ruled that the provision of auxiliary

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[14] The Court's concern with entanglement in Nyquist is equally explicable as a refusal to permit aid to a religious institution, regardless of the aid's intended use.

[15] Levitt is yet another example of this Court's refusal to countenance aid to the core teaching function of a parochial school, no matter what form the aid takes.

services to parochial school students on the premises of the parochial school was invalid because, despite the secular nature of the services, the religious nature of the institution created an inevitable risk that religious influence would affect the secular program. The Title I program at issue in this case is, therefore, as the Second Circuit ruled, directly governed by Meek, and cannot be upheld without overruling that decision.

This Court's understandable concern in Lemon that the administration of a secular teaching program in the context of a religious school poses an inevitable risk that secular teaching would influence religious concerns has touched off a legislative search for a fail-safe method of aiding the so-called secular aspects of parochial education without risking religious intrusion into the process. Given this

Court's recognition that when secular services are delivered by employees of religious schools, the danger of religious influence on the secular program is unavoidable,[16] the focus has shifted to public delivery of the services.[17] Where the services are delivered to all children in a public setting (or are otherwise incapable of religious influence) this Court has sustained the programs.[18] Where, however, as here, the services are delivered on the premises of the religious school in a form that is clearly subject to religious influence, this Court has invalidated the program. Meek v.

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[16] See, e.g., Wolman v. Walter, 433 U.S. at 254; Meek v. Pittenger, 421 U.S. at 366; Committee for Public Education v. Nyquist, 413 U.S. at 786-87 Lemon v. Kurtzman, 403 U.S. at 618-19.

[17] See, e.g., Everson v. Board of Education, supra; Wolman v. Walter, supra; Committee for Public Education v. Regan, supra.

[18] Everson v. Board of Education, 330 U.S. at 17-18; Wolman v. Walter, 433 U.S. at 239-44; Committee for Public Education v. Regan, 444 U.S. at 657-59.

Pittenger, supra; Wolman v. Walter, supra.

Appellants argue that, despite the conceded danger of improper religious influence on a secular educational program whenever children are taught on the premises of a parochial school, New York City's program is acceptable because (1) little evidence exists in the record that religion has played a role in the Title I program in New York City, and (2) since the teaching is performed by public employees who are, often, not adherents of the religion that sponsors the school, the danger of religious influence is so small that it can be ignored. This argument cannot withstand analysis.

In the first place, although appellants repeatedly refer to the record as undisputed, the record in this case is not nearly sufficient to warrant the conclusions appellants seek to draw. Relying on Meek v. Pittenger's clear holding that the

Establishment Clause does not permit the public provision of teachers in religious schools,[19] counsel below took the position that the particular facts of the day-to-day experience of such teachers in New York's classrooms was irrelevant. Thus, plaintiffs neither submitted their own evidence as to the actual influence of the religious setting on the religious school Title I teachers, or the extent to which the Title I teachers inhibited religious activities, nor cross-examined defendants' testimony in that regard. Accordingly, this record could hardly support a new rule of constitutional law. See Rescue Army v. Municipal Court, 331 U.S. 549 (1947). At the least, if the Court believes that it may wish to reconsider the firm rule of Meek and its predecessors, a

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[19] See also Wheeler v. Barrera, 417 U.S. at 428 (Powell, J., concurring) (doubting constitutionality of utilizing public school teachers in religious schools).

remand is necessary for a fuller factual record. Cf. Wheeler v. Barrera, supra.[20]

Moreover, even those teachers who do not share the religion of the parochial school to which they are assigned will feel a degree of constraint in assuring that lessons are not incompatible with, or offensive to, their religious "hosts". In addition, to the extent that an effective Title I "remedial" program requires coordination with the general curriculum, Title I teachers must -- and do -- meet regularly with the parochial school staff to dovetail the "remedial" programs with the remainder of the

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[20] Amici, of course, do not urge such a remand, believing that enforcement of the values of the Establishment Clause requires a clear, prophylactic line such as the Court has previously enunciated. A rule which would impose on litigants seeking to enforce vital constitutional rights the enormous burden and expense of litigating the facts of the secular nature of education in hundreds of parochial school classrooms in large cities such as New York is a prescription not only for entanglement, but also for meaningless, because unenforceable, constitutional guarantees.

curriculum, posing yet another likelihood that the administration of the Title I program will be influenced -- in perfect good faith -- by the religious themes and values that pervade the curriculum of any religious school. Finally, entanglement is inevitable (even if wholly unexplored in this record) by virtue of the discipline that the religious school imposes on students in Title I programs: as set forth infra at 39-40, religious schools (like others) suspend students for breaches of school rules. Where those suspensions are based on infractions of religious duties, either such religious violations will result in forced absence of students from Title I classes -- and the effective conditioning of access to a public program on a religious test -- or coordination will have to take place to ensure that the student is allowed to attend the "secular" class alone. The Court has

frequently condemned programs leading to such "Scylla-Charybdis" choices. See, e.g., Committee for Public Education v. Nyquist, 413 U.S. at 788.[21] Thus, despite New York City's attempt to avoid the danger of entanglement, any attempt to teach secular subjects on the premises of a parochial school, even by public school teachers, poses an unacceptably high risk of religious involvement in the secular program.

2. The Danger of Secular Influence on Religious Programs.

The bulk of this Court's concern in the area of entanglement has been with assuring

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[21] Appellants also overlook the fact that approximately 30 percent of the teachers involved in New York's program -- many of whom teach in the same Title I school year after year -- are of the same religious affiliation as the schools in which they teach, posing the very real danger of a good faith and wholly understandable tendency to blur the line between the pervasively religious atmosphere of the school and the wholly secular goals of the Title I program. See, e.g., Lemon v. Kurtzman, 403 U.S. at 617-19; Wolman v. Walter, 433 U.S. at 247-48, 254.

that secular programs are not influenced by religious criteria. As this case demonstrates, the Court's concern has resulted in attempts to evolve a mechanism for public aid to parochial education that minimizes the possibility of religious influence by excluding religious personnel from the program and entrusting its administration to public school teachers.[22] As amici have argued, such an "on-premises" program constitutes forbidden aid to the religious institution and creates an unacceptable risk of religious influence on the secular program. But even if the benevolent fiction of "aid to the child" is expanded to cover on-premises teaching in a parochial school, and even if the substitution of public school teachers for parochial school teachers mitigates the

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[22] See also School District of Grand Rapids v. Ball, supra.

danger of religious influence on the secular program, the cure is far worse than the disease, because, by stationing public school teachers in a religious school, New York City's program threatens the autonomy of the religious institutions themselves.

This Court has, thankfully, had little experience with government attempts to implant secular officials in religious institutions to carry out purely secular functions; but the widespread use of the practice in less fortunate societies bears unsettling witness to the threat to religious autonomy entailed by such a program. In NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979), this Court recognized "the critical and unique role of the [parochial] school teacher in fulfilling the mission of a church-operated school" whose very raison d'etre is the propagation of a religious faith.[23] This Court construed the National

Labor Relations Act narrowly to avoid importing a secular influence into the parochial school. New York City's Title I program, by placing a public school teacher on the premises of a parochial school to teach secular skills, constitutes a greater threat to religious autonomy than the prospect of a labor union in Catholic Bishop. The threat is magnified because no principled basis exists to distinguish between government responsibility for "remedial" teaching, as in Title I, and government takeover of broad categories of the parochial school curriculum, ranging from programs for gifted children to programs designed to enrich the traditional curriculum. The fact that some religious institutions are, apparently, prepared to

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[23] See also Everson v. Board of Education, 330 U.S. at 22-24 (Jackson, J., dissenting) (discussing Cannon Law regarding religious education of Catholic children).

risk their autonomy in order to receive a financial benefit does not mitigate the danger. History teaches that religious autonomy is at least as vulnerable to the financial carrot as it is to the stick.[24]

Even though New York City school officials have commendably adopted certain prophylactic measures designed to minimize certain entanglement problems, these measures themselves create impermissible entanglement. Under the New York City plan, public officials must never cease monitoring all aspects of the Title I program in parochial schools to safeguard against the

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[24] While it may be true that secular interference under Title I in parochial schools occurs only at the invitation of the parochial scool, many such schools, which must operate on razor-thin budgetary margins, could not afford to refuse substantial governmental support of the secular curriculum, regardless of the degree of governmental control that would accompany the aid. A parochial school that steadfastly refused public support of the secular curriculum even as other neighboring schools accepted such support would soon find itself uncompetitive, in terms of educational quality, tuition fees, or both.

many subtle forms of religious influence on public school teachers in the ineluctably religious environment of a parochial school. "Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment." Lemon v. Kurtzman, 403 U.S. at 619. The ongoing monitoring obligations of the public officials do not diminish simply because the public school teachers are teaching "remedial" rather than "regular" classes. Public Funds for Public Schools v. Marburger, 358 F. Supp. 29, 40 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974). The threat of inadvertent fostering of religion persists no matter what label is attached to the secular course taught by the public school teacher in a parochial school and no matter how carefully public officials have structured

the program. The inherent potential for fostering religion requires constant oversight. Tilton v. Richardson, 403 U.S. at 683. Ironically, the city's obligation to avoid Establishment Clause problems requires the city to assume a watchdog role that, if properly undertaken, itself creates obvious and impermissible entanglement.

Moreover, once Title I funds are made available to a parochial school in the form of an on-premises public school teacher, the parochial school's legal autonomy is seriously compromised. For example, the school's ability to give preference in admissions to children of a particular religion is jeopardized, to say nothing of the degree to which employment practices may mirror church doctrine. At a minimum, the school's ability to influence the religious judgments and activities of both parents and children is severely limited. Thus, the

widely reported practice of one inner-city Chicago parochial school, which receives fully twenty percent of its annual budget in the form of Title I and Title II grants, of requiring its students and their parents to attend mass, and suspending the students for the failure of such attendance of parent or child, can hardly be lawful. See Chicago Tribune, October 28, 1984, Sec. 2, p. 1. It has the direct effect of conditioning a student's access to the federally funded program on the child's and the child's parents' adherence to specified religious practices. Cf. Lemon v. Kurtzman, 403 U.S. at 602 (White, J., dissenting) (government aid to religious schools would violate Establishment Clause if religious instruction required or religious qualifications imposed); 42 U.S.C. § 2000d (prohibition of discrimination on basis of religion in federally funded programs).

The combined effect of the physical presence of governmental officials on the premises of a religious institution and the loss of legal autonomy triggered by the receipt of federal funds, creates an unacceptably high degree of secular intrusion into the religious sphere.

CONCLUSION

As amici have argued, this case is not about whether poor children in parochial schools should receive remedial educational services. The sole issue is whether those services may be provided by a public school teacher who is stationed on the premises of the parochial school itself. Since such a physical inter-mixture of public and parochial education (1) constitutes forbidden aid to a religious institution, (2) creates a risk that religious criteria will affect the secular program, and (3) threatens the

autonomy of the religious institution, it violates the Establishment Clause.

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